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WIDOW'S ALIENATOINS.

The 'glorious uncertainty' of the law is illustrated by the present state of the law in India regarding alienations by a Hindu female with the consent of reversioners. Attention has been drawn to the subject in these pages on former occasions (see 16 M. L. J. 243; 19 M. L J. 7; 20 M. L. J. 342). Since the last of them, there have been quite a number of reported cases under this most prolific topic, exhibiting much the same variety of judicial opinion as before Amongst them, we desire to direct particular attention here to the judgment of a Full Bench of the Calcutta High Court in *Debi Prosad Chowdhury* v. *Golap Bhagat*[1] and to some observations of the Judicial Committee in a very recent case in *Bijoygopal Mukerji* v. *Girindra Nath*[2] But reference may usefully be made in this connection, also to the decisions of the Madras High Court in *Kuppier* alias *Venkatasubbier* v. *Kotta Chinnasami Iyer*[3] *Raghupaty* v. *Kannamma*[4] *Brahmanaikudu* v. *Mahalakshmi*[5] and *Arthanari Goundan* v. *Ramasami Goundan*[6]

The Calcutta Full Bench case deserves special attention on account of the eminence of counsel who argued the case and the thoroughness of the arguments (as reported) as also in view of the strength of the Bench that took part in the decision. Here too, as in the Madras Full Bench case, *Rangappa Naik* v. *Kamti Naik*[7] there are differences between the learned Judges on certain points, including the exact basis of the decision of the Judicial Committee in *Bajrangi Singh's*[8] case and its bearing on what may briefly be called the 'consent' theory and the 'relinquishment' theory. The judgment of *Mookerjee J.* clearly shows that so far as the Judgments of the Privy Council are concerned there is no such inconsistency between the earlier and the later cases as is suggested in some of the Madras judgments. The two lines

1. (1912) I. L. R. 40 C. 721.
2. (1914) 18 C. W. N. 678.
3. (1911) 22 M. L. J. 488.
4. (1912) 23 M. L. J. 363.
5. (1912) 24 M. L. J. 583.
6. (1913) 25 M. L. J. 8.
7. (1908) I. L. R. 31 M. 366.
8. (1907) I. L. R. 30 A. 1 (P. C.)

of cases *viz.*, those relating to the consent of reversioners and those relating to 'relinquishment' in favor of reversioners, are distinct and rest on distinct grounds; and the learned Judge it is submitted, rightly, points out that if this distinction is borne in mind, there is no difficulty in appreciating the observations in *Bajrangi Singh's* [1] case. So far as Bengal is concerned, a certain amount of illogicality and confusion had been introduced by a long course of decisions which the Full Bench in *Nobokishore's* case [2] was not prepared to depart from; but no such difficulty exists in the other parts of India.

Summarising the result of the authorities, *Justice Mookerjee* lays it down that the effect of the consent of reversioners to an alienation by a widow is to raise a presumption, which is rebuttable, that the transfer was for a proper purpose or that the transferee had made *bona fide* enquiries and satisfied himself as to the necessity for the transfer. In this view of the law—which applies equally whether the transfer is of the whole or only of a part of the estate—all the learned Judges who sat on the Full Bench agree. This is the view of the Bombay High Court still and of the Allahabad High Court also (see *Ramkrishna Kuppuswami* v. *Tripurabai* [3]. *Abdulla* v. *Ram Lall* [4]. The Madras High Court is alone in the view that the consent of reversioners is more than presumptive evidence of the propriety of the transaction. *Kuppier* alias *Venkatasubbier* v. *Kota Chinnasami Iyer* [5]

It must be said that in the Madras decisions, the 'relinquishment' theory and the 'consent' theory have not always been sufficiently kept distinct. Nor have the Bombay and Allahabad decisions subsequent to *Bajrangi Singh's case* [1] made any attempt to re-consider the question on principle. In *Pilu* v. *Babaji* [6] the Bombay High Court observed generally that the principle of the rule as to the efficacy of reversioners' consent rendered it ordinarily applicable only to alienations *for value* and the Allahabad High Court followed that view in several cases (see *Abdulla* v. *Ram Lall 3 Sarnam Kanwari* v. *Baghunath* [7] *Beni Madho Singh* v. *Jagat Singh* [8]). This statement is in any view not quite accurate; for even as *evidence*, the reversioner's consent may be relied on in

1. (1907) I. L. R. 30 A. 1 (P. C)
2. (1884) I. L. R. 10 C. 1102.
3. (1911) 13 Bom. L. R. 940.
4. (1911) I. L. R. 34 All. 129.
5. (1912) 22 M. L. J. 488
6. (1909) I. L. R. 34 B. 165.
7. (1912) 16 I. C. 187.
8. (1912) 16 I. C. 337.

support of the *propriety* of the transaction, though it may not be a transfer for value,as for instance when a widow gives property to a daughter at the time of marriage. This in substance was the case in *Abhesing Tirabhai* v. *Raising Fatisinghagh* [1]. But in dissenting from this view of the Bombay High Court, the Madras High Court went to the opposite extreme, on the assumption that the rule as to the effect of the consent by the reversioners is not a mere rule of evidence but a rule of *law*, without *any* reference whatever to the nature of the transaction assented to. *See Kuppier* alias *Venkatasubbier* v. *Kotta Chinnasamier*[2] *and Raghupathi* v. *Kannammal* [3]. The extreme limit in this direction is represented by the view of *Sadasiva Aiyar, J.* in *Raghupathy* v. *Kannamma*[2] and *Arthanari Goundan* v. *Ramasami Goundan* [4], who —in seeking out and applying what he considers the 'implication' of their Lordships' judgment in *Bajrangi Singh's case* has overlooked the express statement therein that they have no wish to extend the widow's power of disposition.

We venture to think that the decision in *Bajrangi Singh's case* has no bearing on the law as to surrender or relinquishment, that as laid down in *Behari Lal's* case[5] a surrender can be effective only when it covers the whole estate inherited by the widow from the husband and that it cannot be availed of as a mere contrivance to secure an indirect benefit to the widow herself (see the opinions of *Jenkins C. J.* and *Mookerjee J.* in the Calcutta F.B. case). Even *Harrington* and *Stephen, JJ.* who do not quite agree with *Jenkins C. J.* and *Mookerjee J.* on this point, recognise that an alienation, by which the widow receives money in lieu of the property, cannot reasonably be treated as a 'surrender.' And cases like *Challa Subbiah Sastri* v. *Paluri Pattabhiramayya* [6] *Arthanari Goundan* v. *Ramasami Goundan* [7] are equally hard to justify on the footing of 'surrender, having regard to the proved object of the transaction there in question. The object or purpose would be relevant to the decision of the question whether the transaction is really a surrender.

The Madras view that the decision in *Bajrangi Singh's* case lays down a rule of estoppel (as distinguished from validation),

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1 (1909) 16 I. C. 561.

2 (1912) 22 M. L. J. 488.

3. (1912) 23 M. L. J. 363.

4. (1918) 25 M. L. J. 8.

5. (1891) I. L. R. 19 C. 286

6. (1907) I. L. R. 31 M. 4

7. (1918) 25 M. L. J. 8.

does not appear to have been adopted by the Calcutta or Allahabad High Court, though a rule of estoppel in similar circumstances is recognised by the Bombay High Court. per *Ranade J.* in *Vinayak* v. *Govind*[1] and *Ramkrishna Kuppuswami* v. *Thripurabai.*[2] Some remarks on this aspect of the question will be found in 19 M. L. J. 7 and 20 M. L. J. at p. 344. where reference is made to the decision of the Judicial Committee in *Lala Rup Narain* v. *Gopal Devi*[3] as in a manner inconsistent with this view.

That the Judicial Committee look upon the consent of reversioners only as *evidence* (it may be, strong evidence) of the propriety of the transaction, is, it is submitted, fairly made clear by the course of the judgment and also some of the observations in the recent case of *Bijoy Gopal Mukerjee* v. *Girindra Nath*[4]. Their Lordships say, the case is one that "depends entirely on the facts and that it raises no new question of law as to the powers of a Hindu widow to deal with family property in case of necessity with the consent of then present 'reversioners'; and towards the end of the judgment, they observe that it has "always been a feature of Hindu Law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid."

In the course of the argument, reference appears to have been made both to *Nobokishore's case* and *Behari Lal's case* on the one hand and to *Bajrangi Singh's case* and *Debi Prasad's case* on the other, but the judgment makes no reference whatever to any of them, either by way of explanation or by way of approval or disapproval.

With reference to the decision in *Millik Sahib* v. *Mallikarjunappa*[5] it may be pointed out that the learned Judges make no reference to the decision in *Vrijivan Rangji and others* v. *Ghelji Gokaldas and others*[6] which in similar circumstances, held the transaction invalid, as the consenting heir was a woman, though, under the Bombay Law, she (being the daughter) would take an absolute estate.

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1. (1903) I. L. R. 25 B 129
2. (1911) 13 Bom L. R 940.
3. (1909) I. L. R. 36 C. 780.
4. (1914) 18 C. W. N. 673
5. (1913) 15 Bom.L. R. 1142.
6. (1881) I L R. 5 B. 568

SUMMARY OF ENGLISH CASES.

G. & C. Kreglinger *v.* New Patagonia Meat and Cold Storage Company, Limited: (1914) A. C. 25.

Mortgage—Clog on the equity of redemption—Doctrine of—Statement of the rule—Stipulation for mere collateral advantage, not oppressive, good.

This is a very important decision of the House of Lords on the doctrine of *clog on the equity of redemption,* " the unruly dog " as Lord Mersey calls it " which if not securely chained to its own kennel is prone to wander into places where it ought not to be ".

The jurisdiction which the Courts of Equity sought to exercise in respect of mortgages was only a special application of the more general power which it claimed to relieve against penalties and to mould them into securities. The end to which the Courts of Equity interfered was to ascertain the real nature of the transaction and to put it on that footing. It was in ordinary cases only where there was conduct which the Court of Chancery regarded unconscientious that it interfered with freedom of contract. As established, the doctrine was expressed in three ways (i) once a mortgage always a mortgage; if a transaction was once found to be mortgage, it must always continue to be treated as such and nothing else (ii) the mortgagee should not stipulate for any collateral advantage which would make the remuneration for the loan exceed a proper rate of interest (iii) a mortgage cannot be made irredeemable and any stipulation which clogs or restricts the equity of redemption is void. Rule (ii) proceeded upon the footing of usury laws and had no application to cases where the mortgage was given for the performance of an undertaking as distinguished from payment of a loan. With the repeal of usury laws, it has operation only to this limited extent, viz:, that an agreement for a collateral advantage is bad if it is oppressive or in effect clogs the equity of redemption.

Plaintiffs were a firm of merchants and wool-brokers; defendants were carrying on the business of preserving and canning meat in the course of which they had at their disposal a large number of sheepskins. Plaintiffs advanced £10,000 to the

defendants with a floating charge on their undertaking. Plaintiffs were not to demand repayment till 1915 but defendants had an option to pay earlier. The defendants gave an option to the plaintiffs to purchase their sheepskins till 1915 irrespective of the fact whether the mortgage was redeemed. The question was whether this provision as to option was not a clog on the equity of redemption and void. Reliance was placed on the dicta of Lords Macnaghten, and Davey in *Bradley* v. *Carrit*[1] for the position that any provision which gave the mortgagee a collateral advantage beyond the duration of the mortgage was a clog and was void. Their Lordships held differing from those expressions of opinion, that there was no such rule, that the clause in question gave the mortgagees a collateral advantage and not being oppressive and not also having the effect of clogging the equity of redemption was binding.

The following observations of *Haldane, L. C.* on the authority of precedents are worth noting

"To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague * * * But when a previous case has not laid down any new principle but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent."

As instances of clogs on the equity of redemption, *Lord Parker* gives the following stipulation that if default were made in payment of the money secured on the date specified the mortgagor should not exercise his right to redeem or a stipulation that he should only exercise it as to part of the mortgaged property or on payment of some additional sum or performance of some additional condition.

Viscount Haldane, L. C. held that the rules above referred to would, apply whether the mortgages are legal mortgages or equitable mortgages.

1. (1903) A. C. 253.

Colonial: Gold Reef, Limited *v.* **Free State Rand, Limited**, 1914, 1 Ch. p. 382.

Company — Articles of Association — Construction — Proxy — Foreign Company having no seal—Appointment by Corporation—Companies' Consolidation Act, 1908, *S.* 68.

Under S. 68, Companies Consolidation Act, the vote given by a representative of a Corporation which holds shares in a Company, appointed as such by a resolution of the Corporation can be accepted, if the Chairman of the meeting of the Company's share-holders is satisfied of the resolution on a copy of the same being produced. Where a Company's Articles of Association provided that the writing by which a proxy is appointed by a Corporation should be under its common seal, and a Foreign Corporation which had no common seal under the law of its Country appointed a person its attorney by an instrument signed by two of its Directors and the Secretary, in the presence of two witnesses before a Magistrate whose seal was affixed to the same and the person so appointed attorney constituted himself the proxy of the Corporation, *Held* the vote by him as proxy was valid. The rule as to affixing of common seal only applied to Corporations which under the law had a common seal.

In re **Jefferey, Nassey** *v.* **Jefferey**, 1914, Ch. p. 375.

Will—Latent ambiguity—Gift to "brother his wife and their daughter,"—Five daughters in existence,—Which of them was intended to be benefited,—Division into three shares.

The testatrix bequeathed her residuary personal estate between "my brother Walter Jefferey, his wife and their daughter." Walter Jefferey had by his wife five daughters; *Held,* extrinsic evidence could be let in to clear the latent ambiguity and to show which of the daughters was intended to take. In the case evidence was given to show that the testatrix was particularly attached to Phoebe and that the testatrix had prior to this will made another will which she subsequently revoked by which she bequeathed the residue between her brother Walter Jefferey and "his daughter Phoebe." On the question of the share which each of the legatees got under the will, *Held,*

that each of the legatees was entitled to a third share under the will. The ordinary rule that a man and his wife only take one share rests on the doctrine of English Law that a husband and wife are for most purposes one person. The rule being purely one of construction, in the present case, the "and" being placed only before "their daughter" and not also between "Walter Jefferey" and "his wife," there is an enumeration of all the legatees and they take in three equal shares.

S. V. Nevenas & Co. v. Walker and Foreman.—1914, 1 Ch. p. 413.

Restraint of trade—Terms of employment—Severance of good from the bad terms—Manager—Meat importing agency—Reasonableness of time limit—Unreasonableness of area and purpose—Restriction throughout the United Kingdom.

Where a Company carrying on the business of meat importing agency entertained a person as the Manager of the business on terms one of which was as follows, "the Manager shall not for *a period of one year* from the determination of this agreement, whether by effluxion of time or in any other way whatsoever, either solely or jointly with or as agent for any other person, firm or Company directly or indirectly carry on or be engaged, concerned or interested in carrying on within the United Kingdom the trade or business of importer of meat or *any other trade or business similar to any trade or business* carried on during the period of his employment by the Company &c." *Held*, (1) Where two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves and as to be substantially equivalent to two separate covenants, the good part is enforceable notwithstanding its collocation with a bad part. The observation of Lord Moulton at p. 745 in *Mason* v. *Provident Clothing and Supply Co.* [1] is not to be understood as contravening the above rule.

2. A covenant obviously unreasonable as to its purpose or area, is not saved by reason merely of its reasonableness as to time.

3. To preclude a former servant from carrying on his natural business in any part whatever of the United Kingdom is a very strong step and requires exceptional justification.

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1. (1913) A. C. p. 724.

Mitchell v. Mosely, 1914. 1 Ch. p 438 (C. A.)

Deed,—Construction—Mines and minerals,—Conveyance of reversion—Mining lease—Apportionment of rent—Real Property Limitation Act, S. 9.

A conveyance of land passes, unless we find something to the contrary, everything down to the centre of the earth. The grant of the land includes the surface and all that lies supra—houses, trees and the like—*cujus est solum ejus est usque ad caelum*—and all that is infra, *i e.* mines, earth, clay &c.

Where the defendants, the owners of lands gave a mining lease in 1740 for 200 years reserving an annual rent and they subsequently in 1791 and 1828 conveyed some of the lands to which the mines were subjacent, to the plaintiff, the defendants had been receiving the whole of the rent from the mining lessees from 1740 to the date of the action in 1912. The action was for a declaration that the plaintiff is entitled to the mines and minerals under the premises comprised in her conveyances subject to the mining lease and for an account and for payment to her of the proportionate rents under the mining lease. The defendants pleaded in answer. S. 9 of the Real property Limitation Act under which the cause of action for the suit commenced when the rent was first received by some person wrongfully claiming to be entitled to the land or rent. *Held,* the receipt of the whole rent by the defendants, prior to any legal apportionment of the rents between the owners of the reversion, was not receipt by a person wrongfully claiming the rent and so time had not commenced to run against the plaintiffs. The plaintiff can only recover as money had and received, rent for 6 years prior to the action.

Eastes v. Russ, 1914 I. Ch. p. 468 (C. A.)

Restraint of trade—Contract of service—Construction—Microscopis in pathological laboratory—Restraint for life—Area of restriction—Reasonableness.

The case of a mere contract of service stands on a different footing from an agreement made to protect the sale of a goodwill or to guard against the disclosure of special trade secrets. A restraint in a mere contract of service is invalid if it goes beyond what is necessary for the protection of the employer; and this depends on the character of the business. Where the defendant

entered the plaintiff's service as a microscopist in the plaintiff's pathological laboratory and one of the terms of the employment was that the defendant was "not to engage in similar work within a distance of 10 miles from these laboratories, either for himself or on behalf of any other institution of a like character under a penalty of £250." *Held*, this was a restriction from engaging in that trade not merely during the service under the plaintiff but for the period of the defendant's life.

Held, Cozens Hardy M. R. & Pillimore. L.J; Swinfen Eady L. J. dissenting. The restriction was unreasonable and should not be upheld.

BOOK REVIEWS.

A Treatise on the Law relating to Debentures and Debenture holders by Paul Frederick Simonson, M. A. Effingham and Wilson, London. Fourth Edition. Mr. Simonson has brought out a new edition of his valuable book on the branch of Company law relating to the issuing of Debentures and the rights and remedies of Debenture holders. The learned author has dealt with the law under two heads the first relating to trading Companies which are mainly governed by their respective memoranda and articles of association and the first Companies Act of 1862 and the Companies Clauses Consolidation Act 1908; and the second relating to Debentures created by Public Companies and Local Authorities, created by Special Acts of Parliament for carrying out certain specified purposes. The powers and rights of corporate bodies of the second class are governed by the Companies Clauses Act of 1845 and various other similar acts as also by the Special Acts of incorporation creating them.

The learned author's treatment of the subject is very thorough. His clear enunciation of the principles governing the law and his lucid analysis of the case law relating thereto leave very little to be desired.

Whenever we had occasion to refer to it, we have found the book useful; the exposition and criticism of the law as laid down already and suggestions relating to matters not covered by any precedent are very instructive. The Index attached to the

book is copious and exhaustive. The learned author has also given in an appendix the forms relating to the various classes of debentures. We are confident that the book will be found useful by all who may have any occasion to refer to the same. With the almost complete assimilation of Company law in India to that obtaining in England, the work is bound to be as useful here as in England. Corresponding sections between the English Companies Act, 1908, and the Indian Act of 1913 is another useful feature which will greatly facilitate reference.

The Law relating to the Reconstruction and Amalgamation of Joint Stock Companies by Paul Frederick Simonson, M. A. Second Edition, I Effingham and Wilson* 54 *Threadneedle Street, London E. C. Price* 10 *s.* 6 *d.

Mr. Simonson has also brought out a new edition of his law relating to the re-construction and amalgamation of Companies.

This is as it were a commentary on Ss. 120 and 192 of the Companies Consolidation Act, 1908, corresponding to sections 153, 213 and 214 of the Indian Companies Act of 1913.

Like his other publication dealing with the Law of Debentures, we are quite certain that this book will be found very useful especially to those concerned with the promoting and organising of Companies.

Simonsons' Law relating to the reduction of share capital. Effingham and Wilson. This is a new work recently published by Mr. Simonson. We are sure the book will be found useful by all who may have any opportunity to refer to the same.

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